Supreme Court, U.S.
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No. 02-1786

In The

SUPREME COURT OF THE UNITED STATES

ELAINE RUTH ROBINSON

Petitioner

v,

JO ANNE B.BARNHART-RESPONDENT
Commissioner, Social Security Administration

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

PETITION FOR REHEARING

ELAINE RUTH ROBINSON
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Phoenix, AZ 85033-1615

TABLE OF CONTENTS

Page

Table of Cited Authorities. ii

Reasons for Granting the Petition for Rehearing..i

I. The Court should consider and grant this petition for Rehearing because this Petition puts forth a "substantial ground not previously presented" in the Petition for Certiorari, to wit, (1) the record discloses that the conduct of the SSA , Commissioner, ALJ and State Disability Examiner constitutes *criminal conduct* within the meaning of 18 U.S.C.Sec 2071; and (2) this fact properly should be considered in this Courts determination of whether Commissioner (s), ALJ and State Disability Examiner's conduct was "conscience shocking"in the constitutional sense and thereby a violation of substantive due process. . . . 1

II. The Court should consider and grant this Petition for Rehearing because the the July 2002 decision of the United States Court of Appeals for the District of Columbia Circuit in *United States v, TDC Management Corp.*, 288 F. 3d 421 (D.C. Cir. 2002), constitutes an "intervening circumstance [] of... substantial effect." in that the Circuit Court of Appeals in that decision underscored the critical importance and expectation that a federal ombudsman be impartial as to the matters within his or her jurisdiction. 4

Conclusion 6

Rule 44.2 Certificate 7

TABLE OF AUTHORITIES CITED

FEDERAL CASE

United States v, TDC Management Corp., 288 F.3d 421 (D.C. Cir. 2002). I,4,5,6,

Reasons For Granting The Petition For Rehearing

I. The Court consider and grant this petition for Rehearing because this Petition puts forth a "substantial ground not previously presented

"In the Petition for Certiorari, to wit, (1) the record discloses that the conduct of the Commissioner, ALJ and State Disability Examiner constitutes criminal conduct within the meaning of 18 U.S.C.Sec 2071; and (2) this fact properly should be considered in this Courts determination of whether ombudsman conduct was "conscience shocking " in the constitutional sense and thereby a violation of substantive due process.

One permissible ground for a petition for rehearing of an order denying a petition for certiorari is a "substantial ground not previously presented." Supreme Ct. Rule 44(2). As will be fully set forth below, a substantial ground not presented in the Petition for Certiorari is presented herein, and provides further and compelling ground for this Court to grant the writ of certiorari in this case. To the foregoing list we add, in this Petition for Rehearing, the further point that the record discloses Terri B. Lopez, Disability Examiner Arizona Department of Economic Security Disability Determination Service Administration and under contract with the Social Security Administration Did willfully remove conceal and obliterate the complete medical issue's report (TR.241,242,243) by not crediting authorship to Dr. Ann Hirschhorn.in her Case Development Sheet (TR. 100) Dr. Hirschhorn directed the specificity for "specific evaluation questions" (TR. 237,241,242,243) and her issues for medical evidence for Mr. Vandenbergs' three page report of my grueling 7 1/2hours test for multiple Sclerosis impairments.

It was further asserted that this undisputed seven and one half hour of multiple Sclerosis grueling tests medical facts were overlooked by the courts below and taken together, are so manifestly arbitrary and conscience shocking as to give rise to a violation of substantive due process and as to warrant this Court's intervention.

18 U.S.C. Sec 2071 provides:

> Concealment, removal, or mutilation generally
> (a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with ... any public office, or with any ...public officer of the United States, shall be fined under this title or imprisoned not more than three years, or both.
> (b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes mutilates, obliterates, falsifies, or destroys the same, shall be fined under this title or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States.

Note that 18 U.S.C. Sec 2071(b) applies specifically to one who has "custody"[1] of a federal

1. The term "custody" as used in 18 U.S.C. Sec 2071(b) applies to any federal employee who has "access to and control over" the federal records. *See United States v, Poindexter*, 725 F. Supp. 13, 20 (D.D.C. 1989)(holding that statutory term "custody" is not limited to "only those who are custodians of [federal] records in the technical sense, The term "custody as *used* in 18 U.S.C. Sec 2071(b) applies to any federal employee who has "access to and control over" the federal records. *See Coplon v, United States*, 191 F.2d 749 (D. C. Circa 1951).

record meaning that Congress specifically intended that the criminal statue apply to federal employees, such as disability examiner, ALJ, Regional SSA Commissioner who intentionally destroy or willfully and unlawfully conceals or obliterates federal records when such records such as Dr. Hirschhorns are in their possession and control. The ALJ (in his hearing of January 8, 1999) nor did the SSA provide me with the report of Dr. Hirschhorn until February 27, 2001(two years after the hearing) when The United States Court OF Appeals For The Ninth District, Wherein APPELLEE DEFENDANT'S SUPPLEMENTAL EXCERPT OF RECORD, was mailed to me by US Mail after the fact. This conduct is conscience-shocking in the constitutional sense, and thereby a violation of my substantive due process

Note further that criminal sanctions for violation of 18 U.S.C. Sec 2071 (b) expressly include ---in addition to imprisonment of up to three years or fine of both --- forfeiture of federal office, meaning that Congress contemplated that the offense of destruction of federal records would apply, with special force, to federal employees...

Here, the record shows that the ALJ either in the hearing or in his findings did he include Dr. Ann Hirschorn's specific issues which were the basis for meeting just minimum medical impairments.

With this as background, we turn to this Court's substantive due process doctrine and the "guideposts", *Collins v, City of Harker Heights,* 503 U.S. 115 128 (1992), used by the Court to identify government action "can properly be characterized as arbitrary or conscience-shocking in a constitutional sense". *id.* This Court has recognized "time and

of the individual against arbitrary action of government. *County of Sacramento v, Lewis,* 523 U.S. 833, 845 (1998) (internal quotations omitted). Then too, the Court has cautioned that whether a government action "can properly be characterized as arbitrary or conscience-shocking in a constitutional sense,"

II. The court should consider and grant this Petition for Rehearing because the July 2002 decision of the United States Court of Appeals for the District of Columbia Circuit in *United States v, TDC Management Corp.,* 288 F.3d 421 (D.C. Cir 2002), constitutes an "intervening circumstance[]of ...substantial effect," in that the Circuit Court of Appeals in that decision underscored the critical importance and expectation that a federal ombudsman be impartial as to the matters within his or her jurisdiction.

One permissible ground for a petition for rehearing of an order denying a petition for certiorari is an "intervening circumstance [] of substantial effect." Supreme Ct. Rule 44(2).

As will set forth below, the July 2002 decision of the United States Court of Appeals for the District of Circuit in *United States v, TDC Management Corp.,* 288 F.3d 42 (D.C. Cir. 2002), constitutes an "intervening circumstance[] of ...substantial effect"

In *TDC management,* the Government brought an action against TDC Management Corporation ("T DC") alleging misrepresentation of material information in a service contract with the government. *Id* at 422. TDC's obligations under the service contract included serving as a Program Ombudsman in connection in connection with certain

minorities business enterprises that were doing business with, or seeking to do business with, the Government. Id. at 423. As Program Ombudsman, TDC was precluded from having any financial interest in any of the operations of the Program. *Id.* TDC, however, purchased an interest in the Program's operations and failed to disclose this interest to the Government. *Id.* 424. On this record, TDC argued before the Circuit Court that its role as Program Ombudsman, and that, accordingly, TDC was entitled to compensation under its contract with the Government, *Id.* at 427-28. The Circuit Court soundly rejected this argument, finding that TDC's financial stake in the Program and its role as Program Ombudsman were inconsistent. The Circuit Court held:

> Once TDC deviated from its contracted role as impartial ombudsman by seeking a financial stake in joint ventures with private investors and by charging fees for the provision of material assistance to minority entrepreneurs, the district court could properly find that the program, no longer had any value to the government.

(*Id,* at 429).

Thus, the Circuit Court in *TDC Management* underscored the critical importance and expectation that a federal ombudsman be impartial as to the matters within his or her jurisdiction. The Circuit Court went so far as to hold that a federal ombudsman who compromises these standards is of "[no] value to the government." *Id.*

The Circuit Court's July 2002 decision in TDC Management provides additional substantial authority in support of the contentions put forth in our Petition for Certiorari that (1) the ombudsman model has assumed ever-increasing importance in the Executive Branch as an

Certiorari that (l) the ombudsman model has assumed ever-increasing importance in the Executive Branch as an alter alternative means of resolving federal administrative disputes; (2) this trend has important constitutional consequences, pertaining to matters of fairness and impartiality in the resolution of federal administrative disputes; and (3) in light of the foregoing, the constitutional issue here presented of a procedural due process right to fair and impartial federal agency ombudsman is an important question of federal law that has not been but should be settled by this court. *See Supreme* Ct. Rule 10(c). Because, the Circuit Court's decision in TDC Management underscores the critical importance and expectation that a federal ombudsman be impartial as to matters within his or her jurisdiction, this Court should consider and grant this petition.

CONCLUSION

The petition for rehearing should be granted.

Reasons For Granting The Petition For Rehearing

I. The Court consider and grant this petition for Rehearing because this Petition puts forth a "substantial ground not previously presented

"In the Petition for Certiorari, to wit, (1) the record discloses that the conduct of the Commissioner, ALJ and State Disability Examiner constitutes criminal conduct within the meaning of 18 U.S.C.Sec 2071; and (2) this fact properly should be considered in this Courts determination of whether ombudsman conduct was "conscience shocking " in the constitutional sense and thereby a violation of substantive due process.

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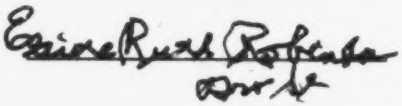
CONCLUSION

The petition for rehearing should be granted.

RULE 44.2
CERTIFICATE

I certify pursuant to Supreme Court Rule 44.2 that this petition for rehearing is restricted to intervening Circumstances of a substantial or controlling effect or to other substantial grounds not previously presented and that it is presented in good faith and not for delay.

Elaine Ruth Robinson



Date: October 31, 2003